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No. 04-218

In the
Supreme Court of the United States

ERIC RODRIGUEZ, MARTIN MALAVE-DILAN, HOWARD T. ALLEN, JEANNETTE SANTOS, DONALD J. JIRAK, RICHARD FLATEAU, CHARLOTTE A. TAYLOR, MERVYN A. CAMPBELL, SARAH BROCKUS, PATRICIA McDOW, LISA BEST, VICTOR OLUWOLE, RUBEN RANGEL, RUSSELL VELAZQUEZ, GUILLERMO LINARES, ISABEL EVANGELISTA, MARTHA PEPIN, MARISEFA REYES, MARIA URENA, TYRONE ZIMMERMAN, JOSE ALVARADO, IRVIN R. McMANUS, WAYNE HALL, SAMUEL PRIOLEAU, WILLIAM RODRIGUEZ, NEVILLE MULLINGS, MARY ADAMS, EUGENE A. BURNETT, HAZEL PALMORE, and JOHNNY VELEZ,

Appellants,

– against –

GEORGE E. PATAKI, Governor of the State of New York,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OPPOSITION TO MOTION TO AFFIRM

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Appellees.

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PRELIMINARY STATEMENT

This case squarely presents the question of what legal standards govern a population equality challenge to a state legislative redistricting plan with a total population deviation just under ten percent, and whether partisan motivation is a legitimate justification for such a deviation. *Cox v. Larios*, 124 S. Ct. 2806 (2004), settled that such claims are cognizable and that partisanship is not a legitimate justification. The court below, however, held that challenges under ten percent may not be maintained unless it is proven that illegitimate reasons were the *sole* cause of the deviation, and that partisanship is a legitimate reason for deliberately deviating from population equality. If these rulings are correct, then *Larios* is a dead letter.

Defendants attempt to divert attention from these important legal issues by asserting that the facts were decisive in this case, and that the stark geographic pattern of population deviations evident in the 2002 Senate Plan just "happens" to have emerged from the conscientious application of "neutral" principles. Mot. at 20. Defendants conveniently ignore, however, that this is a *summary judgment* case, in which the facts must be viewed in the light most favorable to Plaintiffs, and in which Plaintiffs must be afforded the benefit of all reasonable inferences. Notably absent from Defendants' motion to affirm is any mention of the copious evidence in the record—evidence that this Court is bound not just to consider but to *credit*—demonstrating that the 2002 Senate Plan was the result of rank partisan and regional discrimination:

- That the drafters of the Plan purposefully drew the "upstate" districts "*light*, to avoid migration [of a district] downstate";
- That the drafters "took advantage of" the opportunity to "manipulat[e] town combinations" in order to draw upstate districts "lite" [sic];
- That the drafters decided which counties to keep intact by "determining" which "combinations of counties" would "result[] in the greatest population in Westchester connecting to Bronx," thereby shoring up a Bronx Republican incumbent;

- That the drafters concluded that further manipulation would not give the Republicans an "opportunity to pick up a district" upstate because all of the upstate districts had already been drawn as "light" as possible; and
- That once the drafters identified a way to bring the total population deviation just a whisper below ten percent, no further effort was made to reduce or eliminate population deviations.

The undisputed evidence confirms that the "neutral" principles cited by Defendants were not the true reasons for the deviations, but rather are pretexts for Defendants' conscious scheme to subordinate the goal of population equality to the desire to maximize partisan and regional domination. Defendants attempt to portray the regional malapportionment as insignificant, but if that were true they would not have gone to such lengths to manufacture it.

Defendants' posturing aside, it is obvious that the district court's decision below cannot stand alongside this Court's affirmance in *Larios*. *Larios* means either that regional population discrimination claims under ten percent are viable, or that partisanship is not a legitimate basis for departing from population equality, or both. The district court below effectively held that neither type of claim is viable. Notably, this case almost certainly presents this Court's last chance before the 2010 Census to provide guidance to legislatures and lower courts with respect to the proper framework for evaluating population discrimination claims where the total deviation is less than ten percent. Plenary review is warranted.

ARGUMENT

I. Plaintiffs Have Demonstrated Unconstitutional Population Discrimination

A. The Desire to Maximize Partisan Advantage Is Not a Legitimate Basis for Deviating From Population Equality

Defendants struggle mightily to avoid the issue of partisanship, suggesting that the court below "never

entertained the possibility" that the population deviations in the 2002 Senate Plan were justified by partisanship. Mot. at 23, 24. That is false. The court expressly required Plaintiffs to demonstrate that something *other* than partisan motivation caused the population deviations, thus unmistakably elevating partisanship to the status of a legitimate justification for departing from population equality:

> Just as in the racial context where courts must deal with the overlap of racial identity and partisan identification and still conclude that the districting is racially—and not simply politically—drawn to find an equal protection violation, *see, e.g., Easley v. Cromartie*, 532 U.S. 234 (2001), so in the one-person, one-vote context must the plaintiffs who challenge a plan with less than a ten-percent deviation present some evidence that the districting can be traced to impermissible considerations. In New York State, the traditional correlation between 'upstate' districts and Republican political identification (21 out of 24 incumbent Senators upstate are Republican) means that the plaintiffs here needed to proffer more than a mere assertion of a Senate conspiracy for 'upstate' ascendancy to meet their burden of showing a violation of the one-person, one-vote principle.

J.S. 30a.[1]

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[1] The district court's decision to take judicial notice of these political realities was not, as Defendants suggest, unprompted. Rather, Defendants had argued, in response to Plaintiffs' racial gerrymandering claim, that the Legislature's political motivations were, as Defendants put it, "blazingly obvious." The district court accepted that rationale, explaining that "it would be naïve to suggest that all of New York's assemblypersons and senators were unaware of the political import and stakes, and details, of the 2002 redistricting," J.S. 170a, and crediting Defendants' claim that the "political explanation is so blazingly obvious." *Id.* n.173. The question for this Court is whether "blazingly obvious" partisanship is a legitimate justification for deliberately deviating from population equality.

In a thinly veiled attempt to sidestep this key issue, Defendants repeatedly observe that Plaintiffs have not brought a partisan gerrymandering claim under *Davis v. Bandemer*, 478 U.S. 109 (1986). That is true, but entirely irrelevant. The issue in cases like *Davis* and *Vieth v. Jubilerer*, 124 S.Ct. 1769 (2004), is whether a plan that complies with the equal representation mandate should nonetheless be invalidated on the grounds that boundaries of equipopulous districts were drawn in a way that dilutes the voting strength of an identifiable political group. The question here is entirely different: whether *a departure from equality* can be justified based on partisanship. *See Davis*, 478 U.S. at 124 ("The issue here is of course different from that adjudicated in *Reynolds*. It does not concern districts of unequal size."). As this Court has recognized, the difficulty in divining a standard to govern political gerrymandering cases is a reason *for*, not against, requiring legislators to adhere to the easily understood and readily applied equal representation standard. *See Larios*, 124 S. Ct. at 2808 (Stevens, J., concurring) ("[T]he equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength."); *see also Reynolds v. Simms*, 377 U.S. 533, 578-79 (1964) (recognizing that judicial enforcement of equal representation duty counteracts "partisan gerrymandering").

The decision below simply cannot stand alongside *Larios*, which treated the pursuit of partisan advantage as an illegitimate reason for departing from population equality. When 2010 arrives, legislators inevitably will view *Larios* as forbidding deviation from equality on the basis of partisan motivation, but will view this case as approving such motivation so long as it is accompanied by some minimal lip service to a permissible alternative objective. It is imperative that this Court clarify which view is correct.

B. Plaintiffs Have Demonstrated Impermissible Regional Discrimination

Incredibly, Defendants suggest that judicial scrutiny of the regional discrimination evident in the 2002 Senate Plan is inappropriate because the Plan could have been drawn by a

"neutral redistricting commission." Mot. at 23. The reality, however, is that the Plan was *not* drawn by a neutral commission, but rather by Senate Republicans. Moreover, even a cursory glance at the map confirms that the drafters were anything but "neutral." It is simply inconceivable that a "neutral" drafter would devise a plan in which every single upstate district is underpopulated and every single downstate district is overpopulated.

Defendants also attempt to evade Plaintiffs' regional discrimination claim by arguing that upstate New York and downstate New York are not "identifiable regions," and that the downstate region has been defined by Plaintiffs "solely by overpopulated territory." Mot. at 9, 10. Defendants conveniently ignore, however, that it was *the drafters of the Plan themselves*—not Plaintiffs—who labeled as "upstate" those districts that were to be deliberately underpopulated in order to prevent the reapportionment of a district to what they labeled the "downstate" region of the State. Those are the words of the Plan's chief architect, not Plaintiffs. J.S. 279a.

In any event, the evidence in the record confirms that the amount of malapportionment between the upstate and downstate regions *would be precisely the same* if Long Island were considered part of downstate, and *would be virtually the same* if Rockland or Orange Counties were excluded from downstate or if Westchester County were included in its entirety. J.S. 251a-252a & n.1. Thus, the suggestion by Defendants and by the court below that Plaintiffs' use of the terms upstate and downstate was "self-serving" (Mot. at 9; J.S. 31a) is doubly unavailing. The Plan's drafters used those terms long before Plaintiffs did, and marginal adjustments to those regional definitions would have made no difference.[2]

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[2] Nor is there any truth to Defendants' baseless claim that the portions of the downstate region located just outside of New York City have "nothing in common with the City." Mot. at 9. It is undisputed that the 29 contiguous districts in the downstate region correspond very closely with the New York State part of the New York/New Jersey Metropolitan Division of the NY/NJ/PA Metropolitan Statistical Area, defined by the Office of

Defendants also attempt to deflect this Court's attention from the Plan's purposeful population discrimination by focusing on citizen voting age population ("CVAP") statistics, rather than total population statistics. It is undisputed, however, both that the New York Constitution requires districts to be apportioned on the basis of total population, not CVAP, *see* N.Y. CONST. art. III, § 5-a, and that the Legislature *had no access* to CVAP statistics when it considered and enacted the 2002 Senate Plan. It therefore could not have been the Legislature's purpose—the touchstone of the constitutional analysis—to "enhance" the voting strength of the downstate region. Tellingly, Defendants cite no authority for the curious proposition that total population statistics are a mere "proxy" for "voting equality." Mot. at 12. To the contrary, this Court has repeatedly reaffirmed that the equal population principle requires "equal *representation* for equal numbers of *people*." *Reynolds*, 377 U.S. at 559-60 (quoting *Wesberry v.* , 376 U.S. 1, 18 (1964)) (emphasis supplied).

Finally, Defendants argue that regional discrimination is not actionable absent a showing of "animus"—*i.e.*, an actual "purpose . . . to harm" the disadvantaged region. Mot. at 14-15, 22. Defendants cite no authority for this proposition, however, nor could they. Indeed, in *Reynolds*, there was not a shred of evidence that the legislators specifically intended to inflict harm on the residents of the underrepresented districts; to the contrary, the legislators wished only to perpetuate their power. *See Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring) (discussing difference between animus and intent).

Management and the Budget and the Census Bureau as an area with a high degree of economic and social integration. J.S. 251a. Moreover, the record contains both the expert report of Dr. Gerald Benjamin, which demonstrates in great detail the persistence of upstate/downstate regional divisions in the politics and governance of New York State, and the testimony of the court-appointed special master, who explained that residents of the Bronx and Westchester "share common interests and outlooks."

Once again, the decision below cannot possibly be squared with *Larios*, which struck down Georgia's redistricting plan because of impermissible "regionalism – namely, a desire by rural and inner-city Atlanta legislators to retain their legislative influence even as the population of these areas has languished in comparison to the high-growth areas of north Georgia." 300 F. Supp. 2d at 1342.[3] The regional discrimination claims in this case and in *Larios* are indistinguishable, and this Court should avoid the confusion that would be certain to follow a summary affirmance here.

C. The Evidence Confirms That the Deviations Were Not "Necessary to Comply With Legitimate Redistricting Principles"

Despite their conscious litigation choice not to proffer *any* evidence of why the districts *actually* were drawn with substantial population deviations, Defendants stubbornly insist, through counsel, that the deviations were "necessary" to comply with various "legitimate" redistricting principles. Each of Defendants' claims is demonstrably false – under any standard, and certainly under the summary judgment standard that applies.

Defendants' contention that the population deviations were the inevitable result of New York's block-on-border and town-on-border rules, Mot. at 10-11, is difficult to take seriously. The evidence is undisputed, and the Plan's chief architect conceded below, that the upstate region is *replete* with violations of the block-on-border and town-on-border rules. Moreover, the record contains direct, incontrovertible evidence that the drafters of the Plan "*took advantage of*" the town-on-border rule in order to *purposefully underpopulate* upstate districts. J.S. 282a (emphasis supplied). It is therefore most peculiar – "other-worldly," to borrow from Defendants'

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[3] The district court's finding that the definitions of upstate and downstate are "self-serving" directly conflicts with *Larios*, which found unconstitutional regional discrimination notwithstanding the fact that "the various witnesses had different ways of defining the boundary between north and south Georgia." 300 F. Supp. 2d at 1323 n.1.

vernacular—that Defendants would attempt to pass off their undeniably deliberate scheme as the mere incidental result of a "neutral" application of state law.

It is equally curious that Defendants choose to press their specious claim that the deviations were necessary to further the "neutral" principle of preserving the Queens County border. As we have demonstrated, the rhetoric of Defendants' counsel is conclusively rebutted by uncontradicted evidence that the only reason the drafters kept Queens—but not adjoining Kings County (Brooklyn)—intact is that doing so enabled them to shift as much white population as possible into a vulnerable Republican district. J.S. 12, 14, 23.

With respect to the "neutral" goal of preserving incumbents, the undisputed evidence confirms that the Legislature did not observe any consistent or evenhanded policy. *See Brown v. Thomson*, 462 U.S. 835, 843, 845-46 (1983) (requiring "consistency of application" and "neutrality of effect" in applying nonpopulation redistricting criteria). The record is uncontradicted that two sets of downstate Democratic incumbents were paired in a naked partisan gambit, conspicuously leaving nearby open seats in both instances. Notably, Defendants' motion makes no attempt to offer a legitimate explanation for these gratuitous Democratic pairings. Rather, Defendants expressly conceded in their summary judgment brief that "pairing incumbents of only one party" is a "key indicator" or "partisan unfairness."[4]

Finally, Defendants contend that the deviations furthered the "neutral" principle of preserving the cores of existing districts. Mot. at 15-17. However, although *some* reconfiguration of districts certainly would have been required in order to effectuate the Census, Defendants have not even

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[4] This Court has endorsed, theoretically at least, the legitimacy of minimal population deviations to protect incumbents in the context of Congressional redistricting (based upon the greater Congressional clout of long-term Representatives), but it has never held that such a policy, particularly one that treats incumbents differently based on political affiliation, can justify a pattern of population discrimination in a *state* legislative plan.

attempted to demonstrate that the deviations could not have been reduced without violating the cores of existing districts.[5] Indeed, Plaintiffs' proposed redistricting plan, which appropriately shifted one district from upstate to downstate, amply preserved the cores of prior districts, with the average upstate district taking *more than two thirds* of its population from a single pre-existing district. J.S. 240a. The *configurations* of existing districts had to be changed, but the *cores* easily could have been preserved without doing violence to the Census.[6]

D. The District Court Applied the Wrong Legal Standard

Defendants attempt to distance the district court from the manifestly improper "sole reason" standard, suggesting that the court really applied an "actual reason" standard. Mot. at 22. It clearly did not. The district court *expressly adopted* the "solely" standard. J.S. at 24a-25a. Moreover, Defendants literally proffered *no evidence at all* regarding the "actual" reasons for the deviations, and Plaintiffs adduced a mountain of evidence both directly proving Defendants' bad faith and reducing their ex-post justifications to rubble.[7] On this record, summary judgment could not conceivably have been granted unless *any hint* of a "neutral" redistricting objective automatically defeats a population discrimination claim of almost ten percent as a matter of law.

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[5] The district court's special master gave much attention to preserving the cores of existing districts in his Congressional plan, even while drawing precisely equipopulous districts and reducing the number of districts by two.

[6] The New York Constitution, which *does* require the Legislature to endeavor to preserve towns and counties where possible, says *nothing* about preserving the cores of existing districts. Nor is there a "tradition" of preserving cores in New York redistricting. Quite to the contrary, when the downstate region lost significant population relative to upstate in the 1960s and 1970s, the subsequent redistricting plans did not sacrifice population equality to preserve the cores of prior districts. J.S. 237a-238a, 268a-269a.

[7] Defendants concede that merely invoking "neutral" principles means nothing "unless those objectives were the actual reasons for the deviations." Mot. at 22.

This case presents an ideal (and timely) vehicle for clarifying the circumstances under which deviations below ten percent are unconstitutional.[8] The question whether the district court applied the correct legal standard is a pure question of law that is ripe for resolution by this Court.

II. The "Legislative Privilege" Issue Is Substantial

Defendants' bold claim that the magistrate judge denied Plaintiffs the discovery in question on *relevance* grounds is ludicrous. The magistrate judge's orders confirm unambiguously that the issue was whether the discovery Plaintiffs sought was protected by "legislative privilege," not whether it was relevant. Because of these erroneous privilege rulings, Plaintiffs were denied the opportunity to adduce even *more* evidence of intentional population discrimination than the powerful evidence that is already in the record.

Defendants' response to Plaintiffs' waiver argument is wide of the mark. The point is not that Senator Bruno "w[as] sued" and "follow[ed] the Federal Rules." Mot. at 6, 29. The point is that Senator Bruno did not assert immunity from suit, removed the case to federal court, *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), and refused Plaintiffs' offer to dismiss him with prejudice.

CONCLUSION

The issue for this Court to decide is not, as Defendants would have it, whether "slavish adherence" to Census data is necessary, Mot. at 16, but rather whether the court below applied the proper standards for analyzing whether the Legislature engaged in the "honest and good faith effort" to achieve population equality that the Constitution requires. This Court should deny Defendants' motion to affirm and note probable jurisdiction.

Respectfully submitted,

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[8] As demonstrated by the amici, lower courts differ wildly with respect to the appropriate legal standard governing population discrimination claims where the total deviation is below ten percent. *See* Amici Br. at 8-12.

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